SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 613

INLAND EMPIRE DISTRICT COUNCIL, LUMBER AND SAWMILL WORKERS UNION, LEWISTON, IDAHO; LOCAL 2679, LUMBER AND SAWMILL WORKERS UNION, BOVILL, IDAHO; LOCAL 2664, LUMBER AND SAWMILL WORKERS UNION, CLEARWATER, IDAHO; LOCAL 2766, LUMBER AND SAWMILL WORKERS UNION, POTLATCH, IDAHO; LOCAL 2684, LUMBER AND SAWMILL WORKERS UNION, LEWISTON, IDAHO; LOCAL 2923, LUMBER AND SAWMILL WORKERS UNION, COEUR D'ALENE, IDAHO; AND HARRY HAINES, POTLATCH, IDAHO, INDIVIDUALLY AND AS PRESIDENT OF INLAND EMPIRE DISTRICT COUNCIL, PETITIONERS,

vs.

HARRY A. MILLIS, INDIVIDUALLY AND AS CHAIRMAN AND MEMBER OF THE NATIONAL LABOR RELATIONS BOARD, GERALD D. REILLY, INDIVIDUALLY AND AS MEMBER OF THE NATIONAL LABOR RELATIONS BOARD, AND JOHN M. HOUSTON, INDIVIDUALLY AND AS MEMBER OF THE NATIONAL LABOR RELATIONS BOARD.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND BRIEF IN SUPPORT THEREOF

GEORGE E. FLOOD,
Seattle, Washington,
JOSEPH A. PADWAY,
JAMES A. GLENN,
Washington 5, D. C.,
Counsel for Petitioners.

INDEX.

Table of Cases Cited.

STATUTES AND AUTHORITIES CITED.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No.

INLAND EMPIRE DISTRICT COUNCIL, LUMBER AND SAWMILL WORKERS UNION, LEWISTON, IDAHO; LOCAL 2679, LUMBER AND SAWMILL WORKERS UNION, BOVILL, IDAHO; LOCAL 2664, LUMBER AND SAWMILL WORKERS UNION, CLEARWATER, IDAHO; LOCAL 2766, LUMBER AND SAWMILL WORKERS UNION, POTLATCH, IDAHO; LOCAL 2684, LUMBER AND SAWMILL WORKERS UNION, LEWISTON, IDAHO; LOCAL 2923, LUMBER AND SAWMILL WORKERS UNION, COEUR D'ALENE, IDAHO; AND HARRY HAINES, POTLATCH, IDAHO, INDIVIDUALLY AND AS PRESIDENT OF INLAND EMPIRE DISTRICT COUNCIL, PETITIONERS,

vs.

HARRY A. MILLIS, INDIVIDUALLY AND AS CHAIRMAN AND MEMBER OF THE NATIONAL LABOR RELATIONS BOARD, GERALD D. REILLY, INDIVIDUALLY AND AS MEMBER OF THE NATIONAL LABOR RELATIONS BOARD, AND JOHN M. HOUSTON, INDIVIDUALLY AND AS MEMBER OF THE NATIONAL LABOR RELATIONS BOARD.

PETITION FOR WRIT OF CERTIORARI

To the Honorable The Justices of The Supreme Court of the United States:

The above named petitioners respectfully petition for a writ of certiorari to review a decision of the United States Court of Appeals for the District of Columbia, rendered on

July 24, 1944 (R. 31). Said judgment reversed an order of the United States District Court for the District of Columbia overruling a motion to dismiss petitioners' complaint (R. 17) and dimissed petitioners' cause of action. The case came before the Court of Appeals by virtue of an order of that court allowing a special appeal (R. 25) pursuant to Title 17, Section 17-101 of the District of Columbia Code.

Opinions Below

The District Court for the District of Columbia, Honorable Alan Goldsborough, Judge, entertained the complaint of the petitioners seeking by virtue of the absence of a fair hearing prior to the conduct of an election, to set aside an order of certification issued by the National Labor Relations Board and overruled the respondents' motion to dismiss. The District Court's opinion was rendered April 4, 1944. The unreported opinion is found in R. 16.

Following the rendition of the District Court's order the Board applied for and was granted an order allowing a special appeal to the Court of Appeals, District of Columbia (Rule 11, Federal Court Rules, Court of Appeals, District of Columbia). After considering briefs and hearing argument, the Court of Appeals, District of Columbia, in a divided opinion, Justices Edgerton and Miller for the majority, Chief Justice Groner dissenting, reversed the court below and directed dismissal of the petitioners' complaint in equity. The opinion of the Court of Appeals (majority and dissenting opinions) appear R. 27 and 28.

Jurisdiction

The judgment of the Court of Appeals of the District of Columbia was entered July 24, 1944 (R. 31). Petitioners grounded their action below upon the original jurisdiction conferred upon Federal courts of controversies arising

under the Constitution and laws of the United States (28 U. S. C. A. 41) (1)) over all "suits and proceedings arising under any law regulating commerce" (Judicial Code, 24 (8); 28 U. S. C. A. Sec. 41 (8)), and upon the jurisdiction with which courts of the United States are endowed under the terms of the Constitution itself, Article III, Sec. 2.

The jurisdiction of this Court is invoked under the provisions of Section 240 (a) of the Judicial Code as amended; Supreme Court Rule 38, par. 5 (b) and 5 (c).

Statutes

The statutes invoked are the National Labor Relations Act, 29 U. S. C. A. 151, *et seq.*, especially 29 U. S. C. A., Sec. 159 (c). Pertinent sections are set out in Appendix A, together with applicable rules of the National Labor Relations Board governing its construction and application which, under recognized cannons of construction, become incorporated as governing provisions of the law unless wholly inconsistent with statutory language.

Statement of Facts and Matters Involved in This Petition

This is a suit for equitable relief (mandatory injunction) from acts and orders of the National Labor Relations Board alleged to be in plain contravention of the Act of Congress creating the Board and charting its authority. The complaint is on behalf of five local unions, and Inland Empire District Council, an organization of numerous such local unions, all affiliated with the United Brotherhood of Carpenters and Joiners of America and the American Federation of Labor, and Harry Haines, individually and as president of said District Council. The membership of the five local unions involved are employees of Potlatch Forests Inc., a corporation engaged in the lumber and sawmill industry in the State of Idaho. Three of these local unions

represent employees in the company's sawmills located at Lewiston, Coeur d'Alene and Potlatch, Idaho. The other two embrace employees in logging operations at Bovill and Headquarters, Idaho. These five labor unions had for years represented the employees of the company in these five operations.

The petitioners in their cause of action complain that the Board conducted a representation proceeding upon the petition of the Congress of Industrial Organizations (hereafter referred to as the CIO), ordered and held an election, and certified the CIO as the collective bargaining representative, without according to these petitioners a hearing upon due notice, all of which is alleged to be in violation of the specific mandate of Congress in the National Labor Relations Act (29 U. S. C. A. Sec. 159 (c)), and in violation of the due process clause of the Constitution of the United States (Amendment V). (Par. 19, 20 and 26 of the Complaint, R. 5, 6 and 10).

Coupled with the cause of action for equitable relief is one for declaratory judgment declaring the proceedings of the Board in the absence of a hearing vouchsafed by statute and guaranteed by the Constitution *ultra vires* and void, and decreeing the Board's certification of the CIO based thereon invalid. Declaratory Judgments Act, 28 U. S. C. A., Sec. 400, Appendix B.

The complaint (R. 1) alleges that, in March 1943, three locals of the CIO filed with the Board petitions requesting certification as bargaining representative of the employees in three of the five operations of the company, contending that the employees of each of the three operations constituted separate and distinct appropriate bargaining units. A hearing on those three petitions was held by the Board at Lewiston, Idaho, May 14, 1943. The Board thereafter found the units sought in the petitions of the CIO inappropriate for the purpose of collective bargaining and

dismissed the petitions.[1] Upon the dismissal thereof that particular proceeding was terminated.

Accepting such decision as final the CIO thereupon filed a new petition, seeking certification in a single unit alleged to include certain employees in all five of the company's operations, and a month later followed this with a motion requesting that the cases theretofore dismissed be reopened and that their petition be treated as an amendment to the original petitions, and that an order be entered peremptorily by the Board directing the holding of an election without affording a hearing on the new petition (R. 4).

Thereupon the Board granted the motion of the CIO, over the objection of these petitioning AFL unions, and issued an order directing the holding of an election in a single unit composed of certain employees in all five plants of the company (including the two plants located at Potlatch and Couer d'Alene, which were not included in the units sought by the CIO in its original petitions), all without affording a hearing or notice of hearing on the new issues involved.[2] The new issues included whether a question concerning representation had arisen since the dismissal of the former petitions, whether it should be resolved by an election, whether a determination was barred by a valid subsisting contract or for other reasons, and particularly the extent of the appropriate unit and the question of which classifications of employees should be permitted to vote in the election.[3] The last question was particularly important because some classes of employees were employed only at the Potlatch and Coeur d'Alene plants which were not involved in the first petitions. Other

[1] In the matter of Potlatch Forests, Inc., and I. W. A.-C. I. O., 51 N. L. R. B. 288.

[2] In the Matter of Potlatch Forests, Inc. and I. W. A.-C. I. O., 52 N. L. R. B. 1377.

[3] See Complaint, R. 7 and 8.

new and incidental questions included the date and places for the election, the payroll date to be used in determining eligibility to vote (which is particularly important where, as here, a large turnover is involved), whether a large number of employees absent in military service possessing employment status and seniority rights should be permitted to vote, and the form of the ballot. All these matters must be determined at or after a hearing but no hearing was allowed on this petition. The record made of the hearing of the former petitions involving different issues was necessarily wholly inadequate for the purpose, but nevertheless the Board arbitrarily determined the new issues without hearing or notice of hearing on the new petition.

The Board, without a hearing, determined which classifications of employees should be excluded from the election, as well as the other issues involved, with the result that the CIO secured a majority. Such majority, however, was less than 50% of the employees eligible to vote under the Board's order.

After the election and as a result of the continued protest of these petitioning AFL unions that a hearing and due process had been denied, the Board, on motion to reconsider and vacate its Decision and Direction of Election, granted a hearing but refused to vacate its Decision and Direction of Election. However, the hearing held after the election was manifestly insufficient especially since the extent of the unit and the employees eligible to vote must be determined before the election. Based upon the result of this election, the Board issued its order certifying the CIO as collective bargaining representative.[4]

The complaint by appropriate allegations alleges this conduct and procedure to be arbitrary and capricious, specifically contrary to Sec. 9 (c) of the National Labor

[4] Potlatch Forests, Inc. 55 N. L. R. B. No. 44.

Relations Act, Sec. 3 of the Rules and Regulations of the Board, and violative of Amendment V of the Constitution. It spells out a clear trespass by the Board on the constitutional concept of due process, by pleading that no notice of the new issues was served on the parties concerned. No hearing on the issues was tendered to the parties affected, nor was a hearing on the issues so framed ever held.

Following the certification of the CIO as collective bargaining representative, petitioners filed their complaint in the District Court. The Board moved to dismiss which motion was overruled. The Board then appealed by special appeal to the Court of Appeals for the District of Columbia, which reversed the lower court and ordered a dismissal of the complaint. Your petitioners now seek a review and reversal of that judgment by this Honorable Court.

Questions Presented

1. May the petitioners invoke the protection of the courts of the United States in order to review a proceeding of the NLRB, judicial or quasi judicial in nature, for the purpose of insuring those requisites of a fair hearing and of due process enjoined upon the Board by the statute creating it and by the Constitution alike, where the cause of action sets forth an infringement of the statutory mandate of a fair hearing and a violation of the constitutional requirement of due process? Despite the constitutional provision that all questions arising under that instrument are committed to the judiciary, are petitioners and all other litigants concluded by administrative recitals professing compliance with due process?

2. Is the rule of the *Switchmen's* and cognate cases[5]

[5] *Switchmen's Union of N. A.* v. *N. M. B.* 320 U. S. 297;
General Committee of Adjustment v. *M. K.* 320 U. S. 323;
General Committee of Adjustment v. *S. P.* 320 U. S. 338;
General Grievance Com. v. *Gen'l. Com. of Ad.*

granting to administrative agencies, such as the Railway Mediation Board under the Railway Labor Act, a high degree of administrative finality intended to extend to the NLRB and other like agencies a complete autonomy and finality in matters reaching into the realm of constitutional law to such an extent and degree that administrative findings as to fair hearing and due process (though conclusively contradicted by their own record) are exclusive of the right of review traditionally exercised by courts of the United States?

Reasons for Granting the Writ

1. *Decision Contra Historic Line of Decisions of this Court.*

The decision of the Court of Appeals for the District of Columbia by a divided court is in conflict with the whole current of decisions of this Honorable Court upon the subject of constitutional law and due process. The majority of the court below conceived this court's decision in the *Switchmen's* and related cases as compelling courts of the United States to decline jurisdiction and to do so in every instance and situation, even those extending into the field of constitutional law. The Court of Appeals, it is respectfully submitted, arrived at its result by erroneously construing and applying the cases grouped under the heading of "Switchmen's cases", *supra.* The scope of those decisions neither embraces nor contemplates a case such as that with which we are here concerned. Our case presents a controversy which has to do with invasion by an administrative agency of the right of fair hearing—a right afforded specifically by the statute (29 USCA 159 (c)) and guaranteed as well by the constitutional requirement of due process. Those decisions left unimpaired the traditional right of every citizen to require that administrative procedure conform to due process and that inquiry

and examination with respect to the adequacy thereof is always within the special province of the judiciary in conformity with the requirements of the Constitution of the United States.

2. Decision Below Contrary to Guaranty of Federal Constitution, Denies Judicial Review of Constitutional Questions and Reposes Finality in Such Questions in Administrative Agency.

The decision of the Court of Appeals of the District of Columbia denies these AFL petitioners the protection of the courts of the United States in a case where the inalienable right to a fair hearing and constitutional due process is infringed by procedure before an administrative agency. This question, never heretofore passed upon by this Honorable Court, is of great and paramount interest.

3. The Question Presented is One of Great General Importance which Has Not Been, but should Be, Settled by This Court.

The question of jurisdiction of the District Court here presented has been foreshadowed in the decision of this Court in the case of the *American Federation of Labor* versus *National Labor Relations Board,* 308 US 401. In that decision this Court stated in reference to this question that:

> "It can be appropriately answered only upon a showing in such a suit that unlawful action of the Board has inflicted an injury on the petitioners for which the law, apart from the review provisions of the Wagner Act, affords a remedy. This question can be properly and adequately considered only when it is brought to us for review upon a suitable record."

In the present case Chief Justice Groner, dissenting, referred to the absence of a decision of this question by

this Court and expressed the preference that the law should be declared by the Supreme Court (R. 30).

Numerous District courts have taken jurisdiction of similar actions involving representation proceedings of the Board and confusion will be allayed by a decision of this question by this Court.

American Federation of Labor, et al v. *Madden et al* (U. S. D. C., D. C., 1940), 33 Fed. Supp. 943;

International Brotherhood of Electrical Workers, et al v. *N. L. R. B.* (D. C., Michigan, 1940), 41 Fed. Supp. 57;

Klein v. *Herrick* (D. C., S. D., N. Y., 1941), 41 Fed. Supp. 417;

Inland Empire District Council, Lumber and Sawmill Workers Union, et al v. *Thomas P. Graham, Jr., et al* (U. S. D. C., W. D., Wash., 1943), 53rd Fed. Supp. 369 (opinion by Judge Black in case brought prior to Labor Board election involving some facts present here.) Action dismissed as premature.

4. Decision Below Permits Administrative Agency to Enlarge its own Jurisdiction Contrary to Limitation Imposed by Congress.

The decision of the Court of Appeals precluding any judicial review whatsoever and leaving the matter of appropriate hearing entirely to the pleasure of the Board left that agency free to withhold, impair or emasculate the statutory grant of an appropriate hearing, and thus by implication to enlarge its authority beyond that vested in it by Congress, in effect to modify, withdraw, amend or repeal the Act of Congress. Courts of the United States will not stand by idle or helpless and permit an agency created by Congress under the doctrine of judicial immunity to defy a congressional demand.

5. Decision Below Misconceives Scope and Purport of Decision in Switchmen's and Similar Cases and, Taking it from its Context, Transposes it to Apply to Constitutional Questions of Due Process not Involved Therein.

The Court of Appeals of the District of Columbia has, it is submitted, taken the *Switchmen's* and cognate cases, which involve purely the Railway Mediation Board and the Railway Labor Act, out of their context. The facts out of which those cases evolve limit their application to the recognition of administrative finality so long as the agency in question proceeds within the authority committed to it by Congress.

That principle appropriate under the facts of those cases cannot be superimposed, however, and made to control a case such as ours which pleads a positive failure and refusal on the part of the Board to comply with the command of Congress that it grant a hearing as a condition to the validity of its action and to conduct by the Board resulting therefrom, which amounts to a denial of due process under the Fifth Amendment to the Constitution. Congress may lodge finality in a bureau where it proceeds in accordance with law, but it may not do so where the agency defies the law and violates the Constitution.

In thus transposing the rule of the *Switchmen's* cases from the circumstances there present to cover those involving violation of due process as in the instant case, the Court of Appeals, it is submitted, adopted a highly erroneous view.

Prayer

WHEREFORE, petitioners pray for a writ of certiorari to issue from this Honorable Court reviewing the judgment of the United States Court of Appeals for the Dis-

trict of Columbia entered in this cause July 24, 1944, to the end that the judgment of that court be reversed by this Honorable Court and that your petitioners have such other and further relief in the premises as to this Honorable Court may seem lawful and just.

By GEORGE E. FLOOD,
Seattle, Washington,
JOSEPH A. PADWAY,
JAMES A. GLENN,
Washington 5, D. C.,
Counsel for Petitioners.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No.

INLAND EMPIRE DISTRICT COUNCIL, LUMBER AND SAWMILL WORKERS UNION, LEWISTON, IDAHO; LOCAL 2679, LUMBER AND SAWMILL WORKERS UNION, BOVILL, IDAHO; LOCAL 2664, LUMBER AND SAWMILL WORKERS UNION, CLEARWATER, IDAHO; LOCAL 2766, LUMBER AND SAWMILL WORKERS UNION, POTLATCH, IDAHO; LOCAL 2684, LUMBER AND SAWMILL WORKERS UNION, LEWISTON, IDAHO; LOCAL 2923, LUMBER AND SAWMILL WORKERS UNION, COEUR D'ALENE, IDAHO; AND HARRY HAINES, POTLATCH, IDAHO, INDIVIDUALLY AND AS PRESIDENT OF INLAND EMPIRE DISTRICT COUNCIL, PETITIONERS,

vs.

HARRY A. MILLIS, INDIVIDUALLY AND AS CHAIRMAN, AND MEMBER OF THE NATIONAL LABOR RELATIONS BOARD, GERALD D. REILLY, INDIVIDUALLY AND AS MEMBER OF THE NATIONAL LABOR RELATIONS BOARD, AND JOHN M. HOUSTON, INDIVIDUALLY AND AS MEMBER OF THE NATIONAL LABOR RELATIONS BOARD.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Opinion of the Court

The opinion of the United States Court of Appeals, decided July 24, 1944, is printed in the record herein at R. 27, dissenting opinion at R. 28.

Jurisdiction

A statement of the jurisdiction of this Court is set forth in the foregoing petition for writ of certiorari.

Statement of the Case

The foregoing petition for writ of certiorari contains a concise statement of the case and, in the interest of brevity, will not be repeated here.

Specification of Errors

1. The Court of Appeals for the District of Columbia, in its opinion by a divided court, erred in holding that the District Court has no jurisdiction of the present suit.

2. The Court of Appeals for the District of Columbia erred in reversing the ruling of the District Court and in ordering a dismissal of the complaint herein.

ARGUMENT

I.

The Absence of Specific Provision for Review in the National Labor Relations Act Does Not Preclude Resort to Traditional Remedies for Relief in Equity

This Court held in the case of *American Federation of Labor* v. *National Labor Relations Board*, 308 U. S. 401, that the review provisions of the National Labor Relations Act did not encompass a case such as here presented. With respect to a case involving only a proceeding for certification of collective bargaining representatives and certification thereof, Congress was silent in so far as review was concerned. Congress did provide for a judicial review of representation proceedings by petition to the Circuit Court of Appeals of the United States when an unfair labor

practice order of the Board is based upon such certification proceeding, and the record of the investigation shall be included in the entire record in such cases (Sections 9(d), 10(e) and 10(f), National Labor Relations Act). This Court, however, rendered clear in that decision that the absence of specific statutory provision for review does not necessarily preclude the applicability of traditional remedies for relief in equity, and the existence of such a remedy was adverted to by the Court of Appeals for the District of Columbia in that case. *American Federation of Labor* v. *National Labor Relations Board,* 103 Fed. (2) 933. This Court reserved decision thereon for some proper occasion, such as is presented by the record in this case, and indicated that a certification is a final order.

If the District Court does not have jurisdiction of the cause of action set forth in the complaint herein, then your petitioners are denied all right of appeal, and appeal is likewise denied in all representation cases in which the employer recognizes the validity of the certification of the Board or in which the Board fails or refuses for any reason to prosecute the employer for unfair labor practices in refusing to bargain with the certified representative. The Board has full discretion to refuse to prosecute such a case. *Progressive Mine Workers* v. *National Labor Relations Board* (C. A., D. C. 1940) 3 Labor Cases 60, 393; *Amalgamated Utility Workers* v. *Consolidated Edison Co.,* 60 S. Ct. 561, 2 Labor Cases 29. Thus, if the present review is denied, appeal in any representation case must depend upon whether or not the Board issued a complaint and prosecutes to conclusion the employer for refusal to bargain. To impute such an intent to Congress would be manifestly unwarranted.

The provision of the Act (Section 10(a)) relied upon by the court in *Myers* v. *Bethlehem Shipbuilding Corp.,* 303 U. S. 41, (a complaint case), giving exclusive jurisdiction

to the Board, by its terms applies only to complaint cases in prosecutions for unfair labor practices before the Board. Hence, there is no statute or decision of this Court precluding a right to review in the present case, and such a denial cannot be inferred in view of the traditional remedies afforded by constitutional and statutory provision.

The remedy where due process is involved is committed to the judiciary.

> "The judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States and treaties made, etc., * * *" (Constitution, Article III, Section 2.)

To the extent to which the Constitution in such respects may not have been deemed executory, Congress implemented the provisions thereof by passage of the Judiciary Act, an enactment of the Judicial Code endowing the courts of the United States with the power to hear and determine all suits and controversies arising under the Constitution.

> "The District Court shall have original jurisdiction as follows: (1) of all suits of a civil nature at common law or in equity * * * where the matter in controversy (a) arises under the Constitution or laws of the United States." (Judicial Code, Sec. 24, 28 U. S. C. A., Sec. 41(1).)

Again:

> "of all suits and proceedings arising under any law regulating commerce." (28 U. S. C. A. 4(8).)

Conceding that Congress provided no judicial remedy within the Act for redress of a failure to grant a hearing conformable to the concept of due process, certainly it cannot be said that Congress thereby intended to withdraw judicial remedy. The power to do so is beyond the com-

petence of Congress. The power to extend judicial protection stems directly from the Constitution itself. Congress may either expressly or *sub silentio* withdraw judicial review of an infinite variety of administrative procedures under this or any other act. It cannot, however, withdraw the power of the judiciary to enforce the constitutional sanction of a fair hearing or due process and this obviously for the reason that it is not competent thus to repeal or to rescind substantive provisions of the Constitution. In brief, the rule of the *Switchmen's* case and cognate cases may be taken to apply to procedural processes where the Board acts administratively in its legislative function, but can have no application wherever the Board is charged with infringing or encroaching upon basic constitutional rights. Such a construction would render the Act unconstitutional, and it is familiar law that the courts will impute no such intent to Congress. Hence, this Court will, we feel justified in submitting, indulge no intention on the part of Congress to withdraw judicial protection for the enforcement of a fair hearing and of due process, no matter how much such an intent may have been implied where purely administrative and legislative procedures, such as those comprehended under the Railway Mediation Act and the *Switchmen's* cases, are concerned. We are confident that this Court will not read into the Act that which is not there, namely, the intendment to suppress the constitutional guarantee of judicial protection of due process. It would be intolerable to give high judicial sanction to a premise that Congress may freely withdraw resort to judicial review of a question which involves the essential requisites of due process or other constitutional guaranty.

For all purposes in this case, we may freely concede under principles elucidated in the *Switchmen's* and cognate

cases hereinafter discussed that judicial review by Congress was totally withdrawn by the Railway Labor Act and analogous legislation as to all procedures purely legislative or administrative, particularly so where the agency involved proceeded within the scope of the authority committed to it by Congress. In such circumstances, Congress may properly evince an intent to invest exclusive procedural power over the subject matter in the agency in question and courts will properly respect such intent.

But this leaves unaffected and undisposed of the vital question not involved and presented in the *Switchmen's* and related cases, that is, the question whether Congress intended to suppress a judicial remedy and judicial relief for the protection of the constitutional grant of due process and of a fair hearing, and the further question with respect to whether or not Congress is competent to suppress such judicial remedy. The Court of Appeals, in the opinion of Justices Edgerton and Miller, felt compelled to disallow resort to judicial protection under the construction which it placed upon the *Switchmen's* and related cases. The majority, in fact, conceived or at least expressed no distinction whatsoever between the power of Congress to suppress the remedy of judicial review of administrative acts and decisions within the *scope of authority committed to the administrative agency by Congress* and the power or want of power in Congress to suppress the remedy of judicial review *in matters relating solely to the constitutional right to a fair hearing and to due process.* This distinction, unappreciated by the majority, was clearly seized by Chief Justice Groner in his dissenting opinion when he expressed emphatic objection to the proposition implicit in the majority's opinion that federal courts, which derive jurisdiction from the Constitution itself, could ever be divested of the power to review and pass upon con-

stitutional questions, such as the adequacy of a fair hearing or of due process. The Chief Justice expressed the conviction that the question constituted a matter highly worthy of the attention of the Supreme Court of the United States. We therefore respectfully submit that it is vitally appropriate at this particular juncture in the evolution of administrative law for the Supreme Court to consider and pass upon this question.

Let us enumerate and in one or two instances briefly comment upon historic cases of this Court which preserve to the United States courts the province of confining administrative bodies within the statutory limit of their jurisdiction and authority:

Crowell v. *Benson*, 1932, 285 U. S. 22;
State Commission v. *Safety Gas Co.*, 290 U. S. 561;
Ohio Valley Water Co. v. *Ben Avon*, 253 U. S. 287;
Shields v. *Utah-Idaho Central R. R.*, 305 U. S. 177;
United States v. *Idaho*, 298 U. S. 105.

The case last cited involved an interesting question. A condition precedent to the exercise of jurisdiction by the Interstate Commerce Commission was whether the trackage in question came within or without an exception relating to a spur. Despite the I. C. C.'s holding to the contrary, an independent suit in equity before the District Court, wherein it was found to be included within the spur exception, was affirmed. We in our case likewise seek to determine whether the condition of a fair hearing commanded by Congress was or was not complied with. The case likewise placed a very definite emphasis on the principle that fair hearing, including notice and opportunity to meet issues, constituted the essential substance of due process.

United States v. *Abilene*, 265 U. S. 274:

> "Adversary proceedings are of a judicial nature and are governed by constitutional requirements of procedural due process. * * *"

Morgan v. *United States*, 298 U. S. 468 (1936) and 304 U. S. 1 (1938);
Ohio Bell Telephone v. *P. U. C.*, 301 U. S. 292;
St. Joseph's Stockyards v. *United States*, 298 U. S. 38.

There again, this Court announced the rule that courts of the United States may engage in an independent inquiry as to whether rights are confiscatory and violative of due process. United States courts are not bound by findings with respect thereto of an administrative body. Likewise, note its holding that a prerequisite to a administrative finality of findings and procedure is compliance with due process and a fair hearing:

> "When the legislature appoints an agent to act within the sphere of legislative authority, it may endow the agent to make findings of fact which are conclusive; provided the requirements of due process * * * are met. * * * Nor can the legislature escape the constitutional limitation by authorizing its agent to make findings that the agent has kept within that limitation." (*St. Joseph's Stockyards* v. *United States*, 298 U. S. 38.)

In the case of *Utah Fuel* v. *National Bit. Coal Com.*, 306 U. S. 56, this Court held with the District Court below that an independent suit in equity for relief would lie in the courts of the United States, although it affirmed the finding of the District Court that the Commission's procedure was entirely pursuant to its statutory authority, and therefore dismissed the complaint, not because it did not state grounds for relief, but upon its merits. Warrant

for our action is clearly to be found in the language of the Court in that case:

> "Considering the circumstances here alleged, the great and obvious damage which might be suffered, the importance of the right asserted and the lack of any other remedy, we think complainants could properly ask relief in equity (p. 60)."

Kwok Jan Fat v. *White*, 253 U. S. 454. This case is representative of a long series of cases holding that alien Chinese are entitled to the essentials of a fair hearing even in such a summary matter as a deportation case.

C. M. & St. P. Ry v. *Minnesota*, 134 U. S. 418, illustrating the principle that, where an agency's findings are non-reviewable by statute, the duty is all the more incumbent upon the courts to insure compliance with notice, hearing and due process. Cf. also an opinion by the late Justice Holmes in *Miller* v. *Horton*, 152 Mass. 540, 26 N. E. 100. Likewise, *Kuntz* v. *Sumption* (Ind.), 19 N. E. 474, at 477. Also cases discussed by the late Justice Brandeis requiring notice and hearing in *I. C. C.* cases in the decision of this Court in *Chicago Junction* cases, 264 U. S. 258, at 263-264; *Columbia Broadcasting Co.* v. *United States*, 316 U. S. 407.

II

The Decision Below Misconceives the Scope and Purport of Decision in Switchmen's and Similar Cases and, Taking it from its Context, Transposes it to Apply to Constitutional Questions of Due Process Not Involved Therein.

The *Switchmen's* case arising under the state of facts involved therein, as we have heretofore touched upon, is no barrier to the exercise of equitable jurisdiction by the courts of the United States under the circumstances presented here. A vital factor absent in the *Switchmen's* case, re-

lated and subsequent similar cases—is present here. The factor thereby presented lends to our case the highest significance: We are here dealing with no mere question of legal error inhering in the discharge of a legislative or administrative function. We are confronted with a judicial question involving administrative encroachment and infringement upon the constitutional privilege of due process and of fair hearing.

The question for this Court's determination then is whether the majority below was correct in its assumption that the *Switchmen's* and kindred cases were intended by this Court to constitute the Alpha and Omega of all law upon the subject of administrative agencies, such as the Railway Mediation Board and the N. L. R. B. If so, was the majority below justified in assuming that this Court in that decision intended to lay down the broad and universal proposition that the courts of the United States are powerless to intervene in equity to protect the enforcement of constitutional rights. Is it necessary for the courts of the United States to conclude that that case was intended to announce a principle that action and decisions of administrative agencies, even on constitutional questions, so far supersedes the traditional remedies in equity provided by the judiciary act as to leave such constitutional rights wholly to the mercy of administrative bodies?

It will be perceived that this presents another and a different question than that at issue or that decided in the *Switchmen's* and similar cases. That case did not require that its rule, however, appropriate there, should be extended to cover all administrative decisions so as to render them forever final, irrevocable and non-reviewable even though they deal with constitutional questions. To enthrone administrative bodies with such a degree of administrative finality in judicial and administrative questions would be to confer upon it a revolutionary autonomy wholly out of

place in our system of jurisprudence. It would be a step not in the slightest extent foreshadowed or suggested in the *Switchmen's* case. The distinction between the integrity of the judicial function so far as necessary to preserve and integrate constitutional privileges, rights and sanctions on the one hand, and administrative function on the other, constitutes a sharp line of demarcation between the American democratic process and the continental system of executive absolutism.

We advocate nothing herein which would for a moment arrest or restrain the development of governmental efficiency resulting from resort to or employment of the administrative process and administrative law. Congress has frequently entrusted and may well continue to entrust the complex problems of government today, involving as they do technical, scientific, factual and accounting problems, to administrative specialists, and courts very properly do and should continue to encourage the development of the administrative function. Courts do not substitute their judgment, and we are not here asking the courts of the United States to do so, upon administrative matters for that of the administrative agency specially set up for that purpose. We merely urge—and that and nothing more is involved herein—that administrative bodies be limited to the extent only that they may be restrained from substituting their summary informal and executive judgment upon judicial, and particularly constitutional questions, for that of the members of the judiciary specially trained and selected for that particular function to whom the Constitution and Congress have specially committed the task.

We conceive nothing in the rationale of the *Switchmen's* and cognate cases, justifying any other principle than that which we have just defined. Since, however, the Board at all times and the majority of the court below, in its divided opinion, rested their thesis throughout upon what they sup-

posed to be the conclusion of the *Switchmen's* case, compelling the Federal judiciary to stand aside in the face of administrative decisions under any and all circumstances, let us then devote a brief examination to that case. Its factual content related, as did its companion cases, to jurisdictional disputes over claimed rights to represent employees of a railway. The undisputed province of the Board was that of designating the bargaining agency. So long as the Board discharges its statutory duty, employees were bound by its findings as to which organization represented a majority. The Board's acts *intra auctoritate* were final. In that case due process was admittedly afforded and the question present in ours was absent there. This Court held under such circumstances that the Board's discharge of its administrative function was non-reviewable, that it was intended to be so by Congress, and that the courts could not substitute their judgment for that of the Board. Similarly, we too may concede that had we received that notice and that hearing commanded by Congress, we likewise would be bound by the procedure of the Board and would have no complaint cognizable in the courts of the United States.

We, however, have a concrete, specific right to a hearing which was infringed and denied. The *Switchmen's* case did not purport to close the door to such circumstances. Justice Douglas, speaking for the court, recognized the power of the judiciary to vindicate rights of a fundamental character which otherwise would be obliterated.

Note the careful blueprint which he laid down in order to insure that no vital constitutional right should ever be sacrificed to a summary administrative process:

> "If the absence of jurisdiction of federal courts meant a sacrifice or obliteration of a right which Congress has created, the inference would be strong that Congress intended the statutory provisions governing

> the general jurisdiction of those courts to control (cases) * * *. In those cases it was apparent that but for the general jurisdiction of federal courts, there would be no remedy to enforce the statutory commands which Congress had written into the Railway Labor Act."

In a later case from this Court, that of *Stark* v. *Wickard*, 321 U. S. 288, a great deal of light was cast upon the operative scope of the *Switchmen's* decision. From a reading thereof, it is manifest, we submit, that this Court reiterates the propriety of extending judicial protection to all cases where, but for the jurisdiction and the relief available in Federal courts of equity, no means might otherwise be found for the enforcement of valuable granted rights. In that case where there was absent statutory scheme of review, this court none the less had no hesitancy in invoking a general equity power to restrain the Secretary of the Agriculture from making certain deductions extrinsic to statutory authority.

Here too we have a right to notice and hearing founded on an express command of Congress. Note Justice Reed's language in *Stark* v. *Wickard* (page 309, 10):

> "When definite personal rights are granted by federal statute * * * the silence of Congress as to judicial review is, at any rate in the absence of an administrative remedy, not to be construed as a denial of authority to an aggrieved person to seek appropriate relief in the federal courts in the exercise of their general jurisdiction. When Congress passes an act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted. This permits courts to participate in law enforcement entrusted to administrative bodies only to the extent necessary to protect justiciable individual rights against administrative action fairly beyond the granted powers. The

> responsibility of determining the limits of statutory authority in such instances is a judicial function entrusted to the courts by Congress by statutes establishing courts and marking their jurisdiction . . . Under Article III, Congress established courts to adjudicate cases and controversies as to claims of infringement of individual rights, whether by unlawful action of private persons or by the assertion of unauthorized administrative power."

We are mindful of the decisions of the Court of Appeals, cited by the majority below as authority for its refusal to authorize intervention by a court of equity. That they are not applicable here, we think clearly appears from a reference to their facts and holdings.[6]

We may conclude this discussion of the subject, therefore, by a reference to our constitutional and statutory right to notice and a fair hearing. This is a right which may not be trifled with by an administrative body, nor may such body whittle it away to suit its own pleasure or fiat. It is a right possessing a definite connotation of judicial definitions, and the granting thereof is rendered a condition precedent by the command of Congress imposed upon the Board *in limine* before it may proceed with the exercise of its authority. By affording notice and hearing conformable to due process, the Board has undoubted authority to proceed and may invest itself with administrative finality. By failure thus to accord it, it does not bring itself within the principle of judicial immunity. We therefore clearly plead ourselves within every definition admitting judicial protection and relief laid down by this Court.

---

[6] *Order of Railway Conductors of America* v. *N. M. B.* 141 Fed. 2d 366; *Union Transport Service Employees of America* v. *N. M. B., C. A.* D. C. 141 Fed. 2d 724; *National Federation of Railway Workers* v. *N. M. B.* C. A. D. C. 141 Fed. 2d 725.

III

Distinguishment of Cases Assumed by Court Below to Support its Construction of Switchmen's Case

A majority of the Court of Appeals in support of its decision, cited a number of cases as presumably authority for its view that the *Switchmen's* case required it to deny judicial intervention in our case, and in order to demonstrate the non-applicability of those cases we shall briefly notice their facts and holdings.

First was the *Order of Conductors of America* v. *National Mediation Board*, C. A. D. C., 141 Fed. 2d 366. The Court of Appeals in that case held the Board immune to judicial review under the rule of the *Switchmen's* case although it criticized the Board for failure to investigate charges of collusion between management and a labor organization prior to an ordered election. The *ratio decidendi* proceeded upon the premise that the procedure of conducting elections was within the exclusive commitment of Congress. Confined to the fact of that case, we have no quarrel with it. There was no question of due process, fair hearing or constitutional law raised, discussed or decided.

Second, is the case of *Union Transport Service Employees of America* v. *National Mediation Board*, C. A. D. C., 141 Fed. 2d 724. The Board there proceeded to do only that which Congress confided exclusively to its processes, namely: to hold an election. The complaint lodged against the Board related purely to the mode of counting ballots. Though the District Court entertained jurisdiction, the Court of Appeals properly dismissed the complaint under the rule of the *Switchmen's* case. There again no constitutional question of fair hearing or due process was present. Hence the decision has no relevancy whatsoever to our inquiry.

Third, *National Federation of Railway Workers* v. *National Mediation Board*, C. A. D. C., 141 Fed. 2d. 725. Again the Board held an election denying voting privileges to a certain group after affording the group a complete hearing. The group thereafter resorted to equity. The District Court dismissed its complaint, the Court of Appeals affirming. No conceivable question of constitutional law was there involved. The matters complained of were manifestly inherent in the investigatory process committed to the Board by Congress and merged in the discharge of its legislative function. The decision can have no bearing on the solution of our problem.

A case much in the mind of the court upon argument and referred to by the majority in its opinion was its own recent War Labor Board Decision: *Employers Group Motor Freight Carriers* v. *W. L. B.*, 143 Fed. 2d 145, Justice Edgerton, writing the opinion for the court. That case arose under the jurisdiction of the War Labor Board and the authority of various executive orders and acts of Congress conditioning its processes and procedure. An agency of that Board following investigation and hearings established certain increased wage rates within the area concerned, which in effect were adopted by the Board. The industry complained of the Board's violation of its legal authority in that it erred in considering certain economic factors upon which it predicated its increases. It asserted that such rates, if paid by industry, would produce industrial "failure and dissolution."

The Court of Appeals expressed the opinion that the Board's acts were non-reviewable in the light of the legislative history disclosing a congressional purpose to remove WLB decisions from the periphery of judicial review. Having in mind the context of the Act and the purpose motivating the creation of the WLB, we entertain no doubt

of the propriety of that decision and particularly is this true when we examine the considerations set forth in the opinion in detail, which establish that no possible question of constitutional law was there involved. The court pointed out that none of the acts authorizing War Labor Board procedure conferred upon that board any enforcement power whatsoever. Its directives were "directory only, not mandatory" and "without legal sanction." Industry, therefore, being under no compulsion to pay increased rates was uninjured, unaggrieved.

Nor is there anything in the textual body of the court's discussion of the formula governing judicial review of administrative action, which conflicts with the principle of review which we here seek. Whether we plead (1) administrative action directly injurious to our legally protected interest, or (2) whether our case falls within the orbit of the second category of administrative action furnishing the basis for future judicial proceedings against the plaintiff, is a question unnecessary here to decide. Both grounds for judicial intervention to review administrative action proceed upon the basic proposition implicit in each that courts of the United States, under the command of the Constitution, do not lose power to enforce constitutional sanctions of due process where invasion of basic personal and property rights by administrative action is put in issue even though the governing statute provides no statutory appellate review.

From what we have said, it is therefore necessary to conclude that we in no wise seek to reopen questions put to rest in the *Switchmen's* case. We do not contend for the right of judicial review of administrative acts performed by the agency in furtherance of its congressional powers. What we do contend, however, is that the Board may not refuse us a hearing commanded by Congress,

and then answer our demand therefor with the defense that it may safely do so and leave us remedyless by virtue of a presumed congressional intent to free the Board from judicial compulsion to obey the law. The Board cannot thus by its own *ipse dixit* place itself above the Congress which creates it. The express grant by Congress of the right to a fair hearing necessarily contradicts the Board's assumption—and the assumption indulged in its favor by the Court of Appeals—that Congress intended to leave the Board unrestrained by any judicial remedy requiring it to comply with law. Implicit in the grant is the correlative thereof of a purpose that the right thus expressly granted be implemented, by adequate legal and judicial sanctions of enforcement.

IV.

The Board Acted in Violation of the Statute Creating it and Charting its Authority and in Contravention of the Constitutional Guarantee of Due Process.

Our complaint charges the Board with having failed to grant us a hearing. Whatever the Board's answer may be to this issue, upon its merits, is at this stage of the proceeding immaterial for the motion to dismiss upon the ground that the complaint fails to state a claim upon which relief could be granted, admits plaintiff's allegations and the question is squarely whether or not the Board is free to defy a Congressional command requiring it to grant a hearing upon notice to the parties involved. The statute provides (Sec. 9 (c) Appendix A) as follows:

> Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In

> *any* such investigation, the Board shall provide for an *appropriate hearing upon due notice*, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives (italics supplied).

Since it is the purpose of a hearing to determine among numerous other things the extent of the appropriate unit and the employees who will be permitted to participate in any election which may be held, it is obvious that the hearing required must precede the election. This view is supported by the history of the legislation. For example, it is stated on page 14 of the Report of the Committee on Education and Labor of the Senate (accompanying Senate Bill No. 1958, 74th Cong., 1st Sess., N. L. R. Act) that:

> Section 9 (b) empowers the National Labor Relations Board to decide whether the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or other unit. Obviously, there can be no choice of representatives and no bargaining unless units for such purposes are first determined. And employees themselves cannot choose these units, because the units must be determined before it can be known what employees are eligible to participate in a choice of any kind.

Moreover, it is crystal clear that the appropriate hearing mandatorily required must be a due process hearing upon due notice affording the parties an opportunity to know the issues and meet opposing claims. That such was the intention of the Congress is clear from the legislative proceedings during the enactment of the law. Almost prophetically, it seems, and out of an abundance of caution, in the final stages of enactment the words "upon due notice" were inserted in Section 9(c) by the Conference Committee; as appears in the Report of Conference

Committee on Senate Bill No. 1958 (74th Cong., 1st Sess., p. 5) which reads:

> House amendment No. 12 inserts the phrase "upon due notice" in section 9(c) providing for hearings by the Board on the issue of collective bargaining representation. The conference agreement accepted this amendment out of abundant caution; though it would perhaps be implied that a requirement of a hearing includes due notice to the parties.

We contend that when the Board resorts to the election process to determine an issue of representation, it must hold a hearing prior to the election, else upon plainest principles of fair play and due process, the result of such election cannot be used as a reliable basis for certification. Not only the Act itself, but the Constitution, requires it. *Federal Administrative Law,* Vom Baur, Vol. I, Sec. 290. Vom Baur says (Vol. I, Sec. 290):

> The right to know and meet opposing claims is a right to have the issues and contentions of opposing parties clearly defined so as to be able to meet them by the introduction of evidence and argument. It must be afforded to every interested party to an adversary proceeding as a requisite of a full hearing. Without the right, the other rights incident to a hearing, such as the right to introduce evidence and present argument, become barren and valueless. Failure to afford the right is more than an irregularity in practice, it is a vital defect. It is not technical, but rests on the plainest principles of justice and fair play. The due process clause guarantees no particular form of procedure to enforce the right, as it is a substantial right which does not depend upon form.

Since by the election the issue is generally decided for all practical purposes, a hearing after an election is insufficient. By the common practice of the Board, a full hear-

ing upon due notice is held before an election with an opportunity for a supplementary hearing after the election at which questions of challenged ballots and violations of the rules of the election relating to campaigning in the vicinity of the polling place and like questions are normally considered. But in this case the Board refused a hearing prior to its Decision and Direction of Election and conducted the election without it.

The Board may not simply push aside interested parties and hold elections indiscriminately with the promise that a hearing will be held after the election to make sure that no interested party is injured. Such a hearing would not be "an appropriate hearing upon due notice" required by the Act. Not only would such a policy create unlimited confusion, but it would unavoidably and unfairly affect the rights of parties by reason of the announcement of election results and the influence thereof in units which might be later found to be inappropriate. It would foster the holding of elections and stir up disputes where no question of representation had been found to exist. It would be the reverse of due process, and would destroy the usefulness of the Board itself by giving it authority to act arbitrarily without an opportunity to exercise discretion based on facts established by evidence.

Likewise the Rules and Regulations of the National Labor Relations Board (Appendix C) having the force and effect of law require the holding of a hearing in every case prior to the election, but the Board violated its own rules. If resort to judicial intervention be withdrawn, the Board in setting up its own procedure is judge not only in administrative and legislative functions which it may discharge, but of constitutional questions involved in its procedure. To that extent it may suppress Congressional requirements and to all prayers for relief it need answer only

with judicial immunity. This Honorable Court does not sanction any principle which will permit any agencies created by Congress to destroy the law provided for their government.

V

The Questions Presented Are of Urgent and Primary Public Importance and in the Interest of Stable and Harmonious Industrial and Labor Relationships Need to Be Answered by This Court

The questions involved here are not mere dry questions of law, nor do they deal solely with disputes between private litigants. They are of far reaching importance in a domain of public administration. The interest of important segments, both of labor and of industry, are involved. The future administration of a great act intended by Congress to be at once the charter of the liberties and obligations of labor and industry alike depends upon the answer. Repercussions of this case may well affect the entire structure of administrative law in its relation to constitutional guaranties.

It is scarcely possible to overstate or overemphasize the tremendous effect which the answer to this question will have upon the every day, practical value which for all time to come may be attached to the inalienable rights and privileges which come to us through that portion of the Constitution associated in the public mind with our bill of rights. Answered, as we trust, by this court it shall be in the tenor of requiring administrative agencies, if they wish to enjoy autonomy within their statutory authority to preserve at all times the substance of due process, then we shall have preserved constitutional concepts of freedom and of government by law rather than by men.

We have no hesitancy in proclaiming in support of this writ and in support of the validity of our cause of action that the courts of the United States under the Constitution and the primary enabling acts of Congress possess a full and plenary power to effectuate constitutional grants of due process. We do so without wishing in the slightest to impinge upon the salutary doctrine of modern times which advocates and urges an extension of governmental efficiency through the medium of administrative specialists. We maintain only that the office and function of administrative bodies must halt wherever it conflicts with the Constitution and its safeguards. Let the judiciary yield ever so little to the administrative and executive power in enforcing the benefit of constitutional protection and it will all too obviously be but the beginning of a gradual process of constitutional surrender. Whenever a conflict between the Constitution and governmental agencies or servants of the government may arise, it is now as always the duty and the privilege of the judiciary to require a halt, in the language of James Otis, "*obsta principiis.*"

Conclusion

It is respectfully submitted that, under the provisions of the Constitution of the United States, and statutes and decisions discussed in the foregoing arguments, petitioners have been denied due process, and the decision of the Court of Appeals for the District of Columbia should be reversed.

Respectfully submitted,

George E. Flood,
Seattle, Washington,
Joseph A. Padway,
James A. Glenn,
Washington 5, D. C.,
Counsel for Petitioners.

APPENDIX A

Statutes Involved

The pertinent provisions of the National Labor Relations Act (49 Stat. 449; 29 U. S. C., Sec. 151 et seq.) are as follows:

Rights of Employees

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

Sec. 8. It shall be an unfair labor practice for an employer—

* * * * * * *

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).

Representatives and Elections

Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may

investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.

(d) Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section, and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsections 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

Prevention of Unfair Labor Practices

Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint. Any such complaint may be amended by the member, agent,

or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. In any such proceeding the rules of evidence prevailing in courts of law or equity shall not be controlling.

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon all the testimony taken the Board shall be of the opinion that no person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint.

(d) Until a transcript of the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the Court of Appeals of the District of Columbia), or if all the circuit

courts of appeals to which application may be made are in vacation, any district court of the United States (including the Supreme Court of the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such a person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same

shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States and upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any Circuit Court of Appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; and the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive.

APPENDIX B

The pertinent provisions of the Federal Declaratory Judgments Act (48 Stat. 955, as amended by 49 Stat. 1027; 28 U. S. C., Sec. 400) are as follows:

(1) In cases of actual controversy (except with respect to Federal taxes) the courts of the United States shall

have power upon petition, declaration, complaint, or other appropriate pleadings to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such.

APPENDIX C

The pertinent provisions of Rules and Regulations of the National Labor Relations Board, Article III, Sections 3, 8 and 9 (Eighth Annual Report of the N. L. R. B., pages 223 and 225) are as follows:

SEC. 3. *Same; investigation by Regional Director; definition of parties; notice of hearing; service of notice.*—After a petition has been filed, if it appears to the Regional Director that an investigation should be instituted he shall institute such investigation by issuing a notice of hearing, provided that the Regional Director shall not institute an investigation on a petition filed by an employer unless it appears to the Regional Director that two or more labor organizations have presented to the employer conflicting claims that each represents a majority of the employees in the bargaining unit or units claimed to be appropriate. The Regional Director shall prepare and cause to be served upon the petitioners and upon the employer or employers involved (all of whom are hereinafter referred to as "the parties"), and upon any known individuals or labor organizations purporting to act as representatives of any employees directly affected by such investigation, a notice of hearing upon the question of representation before a trial examiner at a time and place fixed therein, provided that when the petition is filed by an employer the Regional Director shall serve the notice of hearing on the employer petitioner and on the labor organizations named in the petition (all of whom are hereinafter referred to as "the parties"), and upon any known individuals or labor organizations purporting to act as representatives of any em-

ployees directly affected by such investigation. A copy of the petition shall be served with such notice of hearing.

* * * * * * *

SEC. 8. *Record; what constitutes; transmission to Board.*—Upon the close of the hearing the Regional Director shall forward to the Board in Washington, D. C., the petition, notice of hearing, motions, rulings, orders, the stenographic report of the hearing, stipulations, exhibits, documentary evidence, and depositions, all of which shall constitute the record in the proceeding.

SEC. 9. *Proceeding before Board; briefs; further hearing; direction of election; certification of representatives.*—The Board shall thereupon proceed, either forthwith upon the record, or after oral argument or the submission of briefs, or after further hearing, as it may determine, to direct a secret ballot of the employees in order to complete the investigation, or to certify to the parties the name or names of the representatives that have been designated or selected, or to make other disposition of the matter. Should any party desire to file a brief with the Board, the original and three copies thereof shall be filed with the Board at Washington, D. C., within seven days after the close of the hearing. Immediately upon such filing, the party filing the same shall serve a copy thereof upon each of the other parties.